

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

MCMILLAN MCGEE CORP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:21-cv-01988-TWP-MJD
	)	
THIRD SITE TRUST FUND,	)	
	)	
Defendant.	)	
<hr style="border: 0.5px solid black;"/>		
THIRD SITE TRUST FUND,	)	
	)	
Counter Claimant,	)	
	)	
v.	)	
	)	
MCMILLAN MCGEE CORP,	)	
	)	
Counter Defendant.	)	

**ORDER ADOPTING THE MAGISTRATE'S REPORT AND RECOMMENDATION ON  
PETITION FOR IMMEDIATE POSSESSION OF PERSONAL PROPERTY, MOTION  
TO STRIKE AFFIDAVIT, AND MOTION FOR LEAVE TO FILE SURREPLY**

This matter is before the Court on Plaintiff/Counter Defendant McMillan McGee Corp.'s ("McMillan") Objections to the Magistrate's Report and Recommendation ([Filing No. 36](#)), denying McMillan's Petition for Immediate Possession of Personal Property ([Filing No. 7](#)). The Magistrate Judge's Report and Recommendation ([Filing No. 32](#)) also denied as moot Defendant/Counter Claimant Third Site Trust Fund's ("Third Site") Motion to Strike the Affidavit of D. Brent Winder ([Filing No. 15](#)), and granted Third Site's Motion for Leave to File Surreply ([Filing No. 17](#)). For the reasons stated below, the Court **adopts** in its entirety the Magistrate Judge's Report and Recommendation on all motions, **denies as moot** the Motion to Strike, and **grants** the Motion for Leave to File Surreply.

## I. DISCUSSION

This replevin action involves a contract dispute between Plaintiff/Counter Defendant McMillan, an environmental remediation company domiciled in Calgary, Alberta, Canada, and Defendant/Counter Claimant Third Site, a trust created by the U.S. Environmental Protection Agency ("EPA") to fund the cleanup of a tract of land located near Zionsville, Indiana. The background surrounding this case is accurately stated in the Report and Recommendation and need not be repeated in this Entry. (See [Filing No. 32.](#))

McMillan objects to the Magistrate Judge's Report recommending that the Court deny its Petition for Immediate Possession of Personal Property. The basis for McMillan's objections includes several arguments, primarily focused on the contention that the contract between the parties confers no right of possession to Third Site. ([Filing No. 36 at 4-12.](#)) Specifically, McMillan argues that the Magistrate Judge "unreasonably interprets" the contract, that the contract confers no right on Third Site to retain possession of the property, that the contract includes no distinction between the termination of the contract or services under the contract, and that the contract includes no allowance for an "alternate contractor." *Id.* at 7, 9.

Under Federal Rule of Civil Procedure 72(b), the District Court reviews the Magistrate Judge's recommended disposition *de novo*. Having reviewed the Magistrate Judge's Report and Recommendation on the parties' motions, the Court hereby **adopts** the opinion as its own. As the Magistrate Judge pointed out, the standard for a replevin action requires that McMillan establish "that the property is unlawfully detained and that the defendant wrongfully holds possession." ([Filing No. 32 at 11](#)) (citing *Autocephalous Greek-Orthodox Church*, 917 F.2d 278, 290 (7th Cir. 1990); Ind. Code § 32-35-2-4(3)(A)-(B)). The contract at the heart of this dispute fails to include any explicit provision authorizing McMillan to remove equipment in the event of termination.

And while McMillan makes several arguments about what rights the contract does not give to Third Site, it loses sight that its burden is to establish that Third Site has both unlawfully detained and wrongfully held possession of the property. This is something McMillan failed to do.

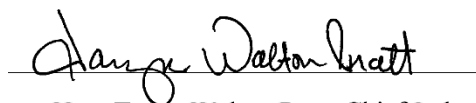
Accordingly, the Court **overrules** McMillan's objection and **adopts** the recommendations set forth in the Magistrate Judge's Report. McMillan's Petition for Immediate Possession of Property ([Filing No. 7](#)) is **denied**.

## II. CONCLUSION

The Court, having considered the Magistrate Judge's Report and Recommendation, hereby **ADOPTS** the Magistrate Judge's Report and Recommendation ([Filing No. 32](#)). The Court **DENIES** McMillan's Petition for Immediate Possession of Personal Property ([Filing No. 7](#)), **DENIES as moot** Third Site's Motion to Strike the Affidavit of D. Brent Winder ([Filing No. 15](#)) in light of McMillan's filing of the Amended Affidavit and **GRANTS** Third Site's Motion for Leave to File Surreply ([Filing No. 17](#)), and the Court has considered Third Site's Surreply.

**SO ORDERED.**

Date: 3/4/2022



Hon. Tanya Walton Pratt, Chief Judge  
United States District Court  
Southern District of Indiana

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